

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ARNOLD H. LICHTENSTEIN,

Plaintiff

v.

Civil No. 95-34-P-C

CONSOLIDATED SERVICES GROUP,
INC., *et al.*,

Defendants

GENE CARTER, District Judge

**MEMORANDUM OF DECISION ON
PLAINTIFF'S MOTION FOR ATTORNEY'S FEES**

Before the Court for action at this time is Plaintiff's Motion for Award of Attorney's Fees (Docket No. 173). After full consideration of the written submissions thereon, the motion is hereby **DENIED**. The Maine law on recovery of attorney's fees is the so-called "American Rule" articulated in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257 (1975), that such fees may be recovered by litigants only by force of a statute or enforceable contract provision. *Vance v. Speakman*, 409 A.2d 1307, 1311 (Me. 1979). Here, there is no contract provision between the parties relied upon for recovery of fees. Rather, Plaintiff resorts to various theories of statutory authorization for recovery of fees in this case.

The fact of the matter is that there is no statutory provision authorizing Plaintiff's recovery of his attorney's fees that is applicable here. Both of the Maine statutes applicable to this action, 13-A M.R.S.A. §§ 627 and 1115, were silent on the matter of recovery of attorney's

fees as of the time the suit was brought. Under Maine law, a statutory right to recover attorney's fees must be explicitly and clearly set forth in the legislative language of the statute relied upon. *Terry v. St. Regis Paper Co.*, 459 A.2d 1106, 1109 (Me. 1983); *Vance*, 409 A.2d at 1311; *Miller v. Fallon*, 134 Me. 145, 148 (1936).

Plaintiff points to 13-A M.R.S.A. § 634 as authority for recovery of fees in this case, that statute allowing a court to award fees to a successful plaintiff. The difficulty with this contention is that section 634 was enacted on May 28, 1997, and it became effective September 19, 1997, during the pendency of this action.¹ For that reason, it collides squarely with the provisions of 1 M.R.S.A. § 302, stating "[a]ctions and proceedings pending at the time of the passage, amendment or repeal of an act or ordinance are not affected thereby." While there was for some period a perceived substantive/procedural distinction in the predicate for application of this provision, the viability of that distinction has now been obviated by the Maine Law Court in *DeMello v. D.E.P.*, 611 A.2d 985, 987 (Me. 1992), and *Portland v. Fisherman's Wharf Associates*, 541 A.2d 160, 163-64 (Me. 1988).

The Maine Law Court has now definitively stated that section 302 "indicates the Legislature's intent that statutes be given prospective application absent **express** statutory intent to the contrary." *Fisherman's Wharf Associates*, 541 A.2d at 163 (emphasis added). The Court there made it clear that in the absence of a clear expression of legislative intent that a statutory enactment operate retroactively, section 302's "rule of prospectivity" operates to bar retroactive application of the statutory provision to pending proceedings. That case is followed in time by *DeMello*, in which the Court specifically abjures the substantive/procedural analysis relied on by the Defendant, stating, "[a]lthough section 302 provides a rule of construction only, we have determined that the rule is **controlling**, 'absent clear and unequivocal language to the contrary.'"

¹This case was commenced on January 30, 1995. See Docket No. 1, Clerk's filing endorsement stamp.

DeMello, 611 A.2d at 986 (citing *Fisherman's Wharf Associates, supra* (emphasis added)).² As construed in *DeMello and Fisherman's Wharf Associates*, the subject provision of section 302 squarely applies to bar the application of 13-A M.R.S.A. § 634 as a statutory authorization for recovery of attorney's fees in this case. No contention is made that the Legislature has expressly indicated any intention that section 634 be applied retroactively, and the Court can find no evidence of such an expression of legislative intent.

In the absence of the applicability of section 634, there is no statutory authorization or contract provision applicable to the circumstances of this case which would authorize recovery of attorney's fees by Plaintiff.

For the reasons stated above, the motion is hereby **DENIED**.

So **ORDERED**.

GENE CARTER
District Judge

Dated at Portland, Maine this 23rd day of June, 1998.

²In *DeMello*, the Court specifically noted the defendant's contention that section 302 did not bar a retroactive application of the statutory provision there in issue because such application "did not deprive the DeMellos of a **substantive right**." *Id.* at 986 (emphasis added). The Court simply noted that that claim was not reached because section 302 controlled "absent clear and unequivocal [legislative] language to the contrary." *Id.* So much for the substantive/procedural analysis approach. Also negated by implication is any contention that section 302 becomes applicable only if retroactive application of the new statutory provision impacts a **substantive** right, as appears to be suggested by the opinion in *Schlear v. Fiber Materials, Inc.*, 574 A.2d 876, 878 (Me. 1990). If that contention were the law thought to apply in *DeMello*, the Court would have been required, as part of its decisional path, to consider and decide whether the repealed section 835 did or did not "embody[] a substantive right." *Schlear, id.*, at 878. See discussion *infra* at n.3. In *DeMello*, the Court made no note of, nor paused to consider, such an issue. The clear implication of that is that the Law Court did not consider that the applicability of section 302 was restricted to instances of impact upon substantive rights by retroactive application of statutory enactments.